

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

08 CR. 84 (DC)

- v. - :

Jason Smith, :

Defendant. :

-----X

**DEFENDANT JASON SMITH'S MOTION TO PRECLUDE
EXPERT TESTIMONY CONCERNING THE DIFFICULTY OF OBTAINING
FINGERPRINTS FROM FIREARMS**

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Of Counsel

TO: **MICHAEL J. GARCIA, ESQ.**
United States Attorney
Southern District of New York
One. St. Andrew's Plaza
New York, New York 10007
Attn: **AMIE N. ELY, ESQ.**
Assistant United States Attorney

July 28, 2008

BY ECF AND FACSMILE: (212) 805-7906

Honorable Denny Chin
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: United States v. Jason Smith
08 Cr. 84 (DC)

Dear Judge Chin:

We write on behalf of Jason Smith to move the Court for a ruling precluding the government from eliciting expert testimony as to the "difficulty locating and lifting usable fingerprints from the surface of a firearm." Gov't Expert Notice, attached as Ex. A. Such testimony should be precluded because, in this case, it does not meet the requirements of Federal Rules of Evidence 401 and 702 or the Daubert test for the admissibility of expert testimony.

The government recently notified the defense of its intention to adduce expert testimony from an unnamed expert, whose qualifications we have not received. See Ex. A. In this case, the firearm was sent for fingerprint analysis "several months" after the defendant was arrested, Gov't Br. of July 25, 2008, at 5. The defense has received a Police Laboratory Analysis Report from the Latent Print Development Unit, dated July 8, 2008, indicating that no latent prints for identification or comparison were found. See Police Laboratory Analysis Report, attached as Ex. B.

The government has provided no information in its notice to support an argument that the proffered testimony is relevant or reliable, as required for admissibility under Rules 401 and 702 and Daubert. Most significantly, there is no indication what the data sample is upon which the unidentified expert will base his or her testimony that it is difficult to obtain useable fingerprints from a firearm so as to render this testimony

Honorable Denny Chin
United States District Judge
Southern District of New York

July 28, 2008
Page 3

Re: United States v. Jason Smith
08 Cr. 84 (DC)

relevant to the particular facts in this case, or that the data sample is based on reliable standards, see Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993). For example, the government gives no indication of (1) the conditions in which the firearms that will serve as the expert's "data points" were found (e.g., were they found in similar circumstances to this case or do the statistics include firearms found in dumpsters, water or other contaminatory settings); (2) how the firearms in the data pool had been handled by law enforcement (e.g., with gloves or without, immediately sent for testing or not); (3) whether the firearms were of similar material to the firearm tested in this case; or (4) whether the firearms had a similar finish to the firearm in this case. The literature in the area of fingerprint recovery makes clear that each of these factors bear significantly on the likelihood of recovering fingerprints. See, e.g., Clive A. Barnum and Darrell R. Klasey, Factors Affecting the Recovery of Latent Prints on Firearms, 47.2 J. Forensic Ident. 140-148 (1997). A generalized opinion about the difficulties of obtaining fingerprints from items made of unspecified materials found in unspecified circumstances and tested after unspecified handling and an unspecified lapse of time is meaningless with respect to any issue in this case.

There is also no indication as to any controlled studies upon which this expert will rely or whether his or her theories have been subject to any type of scientific testing or peer review. All of these omissions counsel against admission of this testimony. See Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 265-67 (2d Cir. 2002).

While such expert testimony has on occasion been admitted in this district, it usually has been admitted without objection by defense counsel. For example, I have reviewed expert testimony given by the criminalist, Nagy Bekhit, who analyzed the gun in this case, in a trial before Your Honor. See Exhibit C, United States v. Apodaca, 04 Cr. 015, Tr. at 108-118. In that trial, without any objection to admissibility or motion to preclude from defense counsel, Mr. Bekhit gave testimony along the lines of that proposed by the government here that clearly fails to meet the Daubert standard. Mr. Bekhit testified that the percentage of recording of prints on guns in his laboratory is approximately 15% and that in his personal experience prints of value are recovered from guns approximately 5% of the time. Tr. at 117-118. He further testified that finding prints of value on bullets is

Honorable Denny Chin
United States District Judge
Southern District of New York

July 28, 2008
Page 4

Re: United States v. Jason Smith
08 Cr. 84 (DC)

even rarer. Tr. at 118. Mr. Bekhit provided no information regarding the time period within which these tests had been conducted, the testing methodology that yielded these results (since that methodology has changed over time), the circumstances in which these guns and bullets had been found, the materials these guns and bullets were made of, the length of time between the guns and bullets being recovered and their testing, or the preservation of the guns or bullets by law enforcement. That is, in offering this testimony, the government's expert offered no scientific methodology or indication that the data had been controlled in any way that would make the application of these statistics relevant or reliable as applied to the evidence in this case, in which the government's theory is that our client handled the gun immediately before it was recovered under a car.

In short, the government has not, and cannot, make a prima facie showing of the admissibility of the proffered expert testimony concerning the infrequency with which prints are found on guns and bullets under Federal Rules of Evidence 401, 702, or Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, (1999) (requiring a trial judge to perform a "gate-keeping" inquiry into both the relevance and reliability of expert testimony based on technical or other specialized knowledge in addition to testimony based on scientific knowledge).

The defense has no objection to Mr. Bekhit providing testimony on the examination he conducted in this particular case or his conclusion that no latent prints were found on the items. But it would prejudice the defendant severely to have a government expert testify that it generally is difficult to recover fingerprints from guns, leading the jury to think that the fact Mr. Smith's fingerprints were not found is insignificant, when that testimony appears to be based on anecdotal information collected without any reliable principle or method. Accordingly, the defense respectfully moves to preclude this testimony at trial.

Respectfully submitted,

Fiona M. Doherty
Deirdre D. von Dornum
Asst. Federal Defenders

Honorable Denny Chin
United States District Judge
Southern District of New York

July 28, 2008
Page 5

Re: United States v. Jason Smith
08 Cr. 84 (DC)

Tel.: (718) 330-1208 / (212) 417-8734

cc: Amie N. Ely
Assistant U.S. Attorney
(via facsimile: (212) 637-2527)

Jason Smith
Reg. No. 60717-054
MCC
(via U.S. Mail)



U.S. Department of Justice

United States Attorney
Southern District of New York

*The Silvio J. Mollo Building
One Saint Andrew's Place
New York, New York 10007*

July 24, 2008

By Facsimile

Deirdre Von Dornum, Esq.
Federal Defenders of New York, Inc.
16 Court Street
Brooklyn, New York 11241

Re: United States v. Jason Smith,
08 Cr. 084 (DC)

Dear Ms. Von Dornum:

This letter provides notice that the Government intends to offer expert testimony at trial from Special Agent Walter Kudron of the Bureau of Alcohol, Tobacco and Firearms. Special Agent Kudron is a firearms expert and is expected to testify about the origin and place of manufacture of the firearm he analyzed in connection with the above-referenced matter. In particular, Special Agent Kudron is expected to testify that the firearm recovered in this case is a Hi-Point 9 mm caliber handgun that was manufactured outside the State of New York, and that the ammunition recovered in this case consists of seven 9 mm caliber bullets that were manufactured outside the State of New York. Enclosed is a summary of Special Agent Kudron's qualifications.

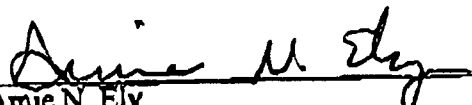
The Government also intends to offer expert testimony at trial regarding the recovery of fingerprints from firearms. The expert will testify, generally, about the difficulty locating and lifting usable fingerprints from the surface of a firearm. We will provide a summary of the expert's qualifications when we receive them.

Deirdre D. von Dornum
July 24, 2008
Page 2 of 2

If you have any objections to the introduction of testimony from these expert witnesses, please advise the Government promptly.

Very truly yours,

MICHAEL J. GARCIA
United States Attorney

By: 
Amie N. Ely
Assistant United States Attorney
Telephone: (212) 637-2214

Encl.

07/11/2008 14:18 7185586756

PAGE 02/02



POLICE LABORATORY
ANALYSIS REPORT

Police Lab No. 08F0179
U.F. 61 No. 155 Pct. 048
Precinct Voucher No. N946999
Precinct Voucher No.

PAGE 1 OF 1

LABORATORY CLASSIFICATION LATENT PRINT DEVELOPMENT UNIT DATE 7/8/08

RECEIVED FROM DET RANK LITRELL NAME 928302 SHIELD NO. FIU COMMAND

ON 1/7/08 DATE THE FOLLOWING ITEMS LISTED BELOW:

Laboratory No.	Identifying Marks	EVIDENCE
08F0179	NB	1- One Hi-Point 9mm cal. handgun, ser.#P113361
	NB	2- Four 9mm cal. cartridges
	NB	3- One handgun magazine

NYC POLICE DEPARTMENT
CRIME LABORATORY

This document is CERTIFIED and hereby AUTHENTICATED as an exact photocopy of the original record on file. This photocopy was made on

Today's date 7/11/08

I Title NAME P. Anes tax #

Do hereby CERTIFY and AUTHENTICATE this document as a True copy of the original document on file.

Signature Patricia Anes

RESULTS OF EXAMINATION OR ANALYSIS:

- The above described evidence was submitted to the Latent Print Development Unit of the Police Laboratory for a latent print examination.
- No latent prints for identification or comparison were found.

The results are the opinion / interpretation of the examiner.

I hereby certify that I tested / examined / analyzed the above described item(s) and that this report is a true and full copy of the original report made by me.

False statements made herein are punishable as a Class "A" misdemeanor pursuant to section 210.45 of the Penal Law

CRIM NAGY BEKHTI
RANK NAME SHIELD NO.
CRIMINALIST / POLICE OFFICER - POLICE LABORATORY

US ver Vasquez - 4aj6APO1.txt
18 MR. MARRAH: No, she's not.
19 MS. BROWN: The signature, your Honor, I think was
20 intended to be redacted.
21 THE COURT: I don't think so.
22 MR. MARRAH: That is not my understanding.
23 THE COURT: That wasn't my understanding.
24 MS. BROWN: That's fine, your Honor.
25 THE COURT: OK.
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107

4AJAAAP02 Simpson - Redirect
1 MR. MARRAH: Nothing further.
2 THE COURT: Recross?
3 MS. BROWN: Two quick questions, your Honor.
4 THE COURT: Yes.
5 RECROSS EXAMINATION
6 BY MS. BROWN:
7 Q. About photographs, you said that the car windows that the
8 front was a lesser tint than the side?
9 A. Yes, with the window opened, yes.
10 Q. You didn't take any photographs of how the tinted windows
11 looked on that night, did you?
12 A. No, ma'am.
13 Q. And with respect to the imitation pistol that you have been
14 talking about that is a BB gun, right?
15 A. Yes, as we call it an imitation.
16 Q. Same thing as BB gun, no difference?
17 A. That was a Daisy I think. I believe it was a Daisy BB gun.
18 MS. BROWN: Nothing else, your Honor.
19 THE COURT: All right, Ms. Simpson, you play step
20 down.
21 THE WITNESS: Thank you, sir.
22 MR. MARRAH: The government calls Nagy Bekhit.
23 THE COURT: Mr. Bekhit, right up here, please.
24 NAGY BEKHIT,
25 called as a witness by the Government,
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108

4AJAAAP02 Simpson - Recross
1 having been duly sworn, testified as follows:
2 DIRECT EXAMINATION
3 BY MR. MARRAH:
4 Q. Good morning, Mr. Bekhit.
5 A. Good morning to you.
6 Q. Where do you work?
7 A. New York City Police Department Forensic Investigation
8 Division.
9 Q. How long have you been with the Forensic Investigation
10 Division?
11 A. Since 1991.
12 Q. What is your current assignment?
13 A. I am a criminalist.
14 Q. What does that mean?
15 A. Criminalist is a person who works with evidence of,
16 forensic evidence comes to his position from crime scenes.
17 Q. Are you assigned to a particular unit or division as a
18 criminalist?
19 A. Yes.
20 Q. What unit is that?
21 A. The latent print development unit.
22 Q. How long have you been working in the latent print

US ver Vasquez - 4aj6AP01.txt

23 development unit?

24 A. Since 1995.

25 Q. And where did you work before you came to your current

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109

4AJAAAP02

Bekhit - Direct

1 position?

2 A. I was working in the narcotic analysis section in the same
3 lab.

4 Q. And what are your responsibilities in the latent print
5 development unit?

6 A. Receiving evidence come to my position from different crime
7 scenes, may use optical, chemical or mechanical methods to
8 develop prints. If I find any prints I have to photograph it
9 and send it to the latent print unit for further evaluation and
10 comparison and then I go to the court of law to testify for
11 what I find.

12 Q. Mr. Bekhit, can you please tell the jury what a latent
13 print is?

14 A. Latent print is an impression made by the finger or by the
15 palm or even by the bare foot on a surface and it's very hard
16 to see it with our naked eyes.

17 Q. What other types of fingerprints are there other than
18 latent prints?

19 A. We have fingerprint which normally they have it on like
20 official papers, the court the thing, courts they have what
21 they call latent prints and latent prints you can see it made
22 by media between the finger and the surface like a glove or
23 grease or something. You can see it easy. This is some type
24 of prints.

25 Q. Are there any other types?

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110

4AJAAAP02

Bekhit - Direct

1 A. Good prints, I mean overlapping prints, smudge prints, this
2 is things, you know, I mean it's could happen from different
3 area.

4 Q. What type of training do you have in respect to latent
5 fingerprint identification and development?

6 A. I received three months of training by the most senior
7 person in that unit at that time show me how to do the work to
8 develop prints on different types of surfaces, reading. And
9 after that I attended many seminars and classes and conferences
10 made by lot of experts in the field and from the F.B.I. and
11 other experts from the United States and Canada.

12 Q. Do you belong to any professional organizations?

13 A. I am a member of the International Association for
14 Identification.

15 Q. Over the course of your career how many times have you
16 analyzed evidence for finger prints?

17 A. Thousands.

18 Q. Have you tested guns before for latent fingerprints?

19 A. Yes.

20 Q. Approximately how many times?

21 A. A lot, hundreds.

22 Q. Have you tested bullets before for latent fingerprints?

23 A. Yes.

24 Q. Approximately how many times?

25 A. Thousands.

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Page 27

US ver Vasquez - 4aj6APO1.txt

111

4AJAAAP02

Bekhit - Direct

1 Q. Have you testified as an expert in fingerprint recovery and
2 development?

3 A. Yes.

4 Q. How many times have you testified as an expert?

5 A. Approximately 80 times.

6 Q. And what court have you testified as an expert in finger
7 print recovery and development?

8 A. All state and federal courts in New York.

9 Q. Mr. Bekhit, when a person handles or touches an item will
10 there always be a latent print?

11 A. No.

12 Q. What types of environmental factors, are there any that
13 will impact whether you are able to develop and find a latent
14 print?

15 A. First of all, the surface which you are going to touch, if
16 the surface is smooth it's a better chance to leave a print on
17 it. If the surface is hard or texture it's going to be hard to
18 leave a print on it. The humidity affects the prints. The
19 heat affects the prints. The storage effects the print and
20 many other -- it's many factors.

21 Q. Is there anything -- what, if anything, from the person
22 actually leaving the print could affect the ability to recover
23 the print?

24 A. Some people they don't sweat so if they touch any surface
25 they are not going to leave a print on it and some other people

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112

4AJAAAP02

Bekhit - Direct

1 if they wear gloves, if they touch anything they are not going
2 to leave a print on the surface.

3 Q. If there was something on the hands would that impact it?

4 A. If the person sweat a lot still it is not going to leave a
5 good print.

6 Q. With respect to guns, specifically, what affects your
7 ability to get prints?

8 A. Leaving a print on the gun is very hard for many reasons.

9 The first reason that the conducive area and the gun is very
10 limited. Another reason that most of the manufacturer they
11 coat their gun with a special material to prevent the gun from
12 getting rusty and that is affecting the person to leave a print
13 on the surface. Some people when they keep their gun they keep
14 it in their waists so when you push the gun down in your waist
15 you erase any print or some people they leave it under a
16 mattress and a pillow. This all affects that leaving a print
17 on a gun.

18 Q. With respect to bullets, specifically, what affects your
19 ability to get prints?

20 A. It's harder on a bullet. To leave a print on a bullet is
21 very hard.

22 Q. Why is that?

23 A. The shape of bullet is round and small so normally when a
24 person handles a bullet to put it in a magazine or bullet in a
25 cylinder he role the -- automatically you role the bullet in

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113

4AJAAAP02

Bekhit - Direct

1 your hand so it's hard to leave a good print on the bullet.

2 Q. Mr. Bekhit, what were you asked to do in this case?

3 A. Trying to find the print on the gun.

US ver Vasquez - 4aj6AP01.txt

4 MR. MARRAH: May I approach, your Honor.
5 THE COURT: Yes.
6 Q. I've handed you what has been admitted in evidence as
7 Government Exhibit 1. Do you recognize Government Exhibit 1?
8 A. Yes.
9 Q. What is it?
10 A. It's the gun that I tried to lift the prints from it.
11 Q. How can you tell that is the same gun?
12 A. It has my initial on the side. NB stands for my name, Nagy
13 Bekhit. It has the lab number on it too with red marks, if you
14 can see it.
15 Q. What was the condition of the gun when you received it?
16 A. It was in a bag sealed.
17 Q. And do you recall when you received it?
18 A. Can I refer to my notes, sir?
19 THE WITNESS: Your Honor, can I refer to my notes?
20 THE COURT: Yes, if you do not recall.
21 MR. MARRAH: May I approach?
22 THE COURT: Yes.
23 MS. BROWN: May I see what the witness is referring
24 to, your Honor?
25 Q. I am going to show you what is marked as 3505 B. Take a
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114

4AJAAAP02 Bekhit - Direct
1 moment to just review that without reading it, without reading
2 it out loud. Does that refresh your recollection?
3 A. Yes.
4 Q. So approximately when did you receive --
5 A. I received it in August 10, 19 -- I mean, sorry, 2004.
6 Q. What did you do with Exhibit 1?
7 A. When I receive it I opened the bag. I checked the gun
8 first and I take some notes about it and after that I started
9 doing my analysis on the gun.
10 Q. Can you explain to the jury what the steps are you take to
11 analyze the gun?
12 A. First, I use a very strong light using magnifier glass to
13 see if any prints on gun I can see with a light reflection and
14 I couldn't see anything, so I use a special forensic light to
15 try to see anything I can't see with the regular light and it
16 was nothing. After that I use the cyanoacrylate and this is a
17 very simple way, exactly the same material as the super glue or
18 the crazy glue.
19 We use drops of this super glue. We put on small
20 chamber, is a small dish and we heat up this material and the
21 material evaporates and when it evaporates fingerprints if any
22 fingerprints on the gun, and until that step I looked at the
23 gun it was nothing. So further I use some forensic florescent
24 dyes to enhance the gun or the prints. If anything there
25 spraying that reagent on the gun using a special light, try to
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115

4AJAAAP02 Bekhit - Direct
1 view if any prints there and with that it was no prints of
2 value found on the gun.
3 Q. Now, does that process do anything to the appearance of the
4 gun?
5 A. Excuse me?
6 Q. Does the process you just described do anything to the
7 appearance of the gun?
8 A. No.

US ver Vasquez - 4aj6AP01.txt

9 Q. Does the gun look different after you finish testing it, is
10 there residue?
11 A. If we use forensic light we might find some residue on it
12 but not with the regular light.
13 Q. I am saying after you've applied the glue and the chemicals
14 does the gun appear a little different after you've done that?
15 A. No, it's the same gun.
16 Q. I understand it is the same gun, but I'm saying is there
17 anything left from your testing that changes the coloring of
18 the gun?
19 A. The color under regular light is the same.
20 Q. You said a moment ago 'no prints of value'?
21 A. Yes.
22 Q. What do you mean by 'prints of value'?
23 A. Print of value is means that the print has enough
24 characteristics for comparison.
25 Q. So what do you mean when you say there are 'no prints of
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116

4AJAAPO2

Bekhit - Direct

1 value'?
2 A. It mean that I could find some ridges or some smudge prints
3 or overlapping prints which has no value for comparison or
4 identification.
5 MR. MARRAH: May I approach, your Honor?
6 THE COURT: Yes.
7 Q. I am going to show you what's been marked as Government
8 Exhibit 2. Do you recognize it?
9 A. Yes.
10 Q. What is it?
11 A. This is the bullets I analyzed on that date.
12 Q. How can you tell this is the same bullets?
13 A. It has my initials on each bullet. It has ny initial on
14 the seal and lab number.
15 Q. What condition were those bullets in when you received
16 them?
17 A. It was the same.
18 Q. What do you mean by that?
19 A. It was sealed in a small bag. This bag it was sealed. I
20 cut it open from here from the top and after I finished I put
21 it back and I sealed it and show the seal.
22 Q. What did you do with Government Exhibit 2?
23 A. Same techniques I used with the gun, four steps.
24 Q. The same series of tests?
25 A. Yes.

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117

4AJAAPO2

Bekhit - Direct

1 Q. What were the results of the tests?
2 A. No prints of value found on this bullet.
3 Q. So how many guns have you tested for latent fingerprints,
4 approximately?
5 A. In general?
6 Q. In general.
7 A. I cannot recall the exact number but can I say hundreds.
8 Q. How many bullets have you tested for latent fingerprints?
9 A. Thousands.
10 Q. Any attempt being made by your laboratory to determine the
11 number percentage of fingerprints have been found on guns and
12 bullets?
13 A. The percent of recording of prints on guns approximately 15

US ver Vasquez - 4aj6AP01.txt

14 percent.
15 Q. Now, that study, what types of print were those? was that
16 just print of value?
17 A. This was mixed. Could be prints of value and prints no
18 value.
19 Q. If a print is not of value can it be used? what could it
20 be used for?
21 A. It's going to be negative. It has no value, so this is not
22 going to be used for anything.
23 Q. Based on your personal experience what is the approximate
24 percentage of time that you find prints of value on guns?
25 A. With my personal experience I -- it's no more than five
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118

4AJAAAP02 Bekhit - Direct
1 percent of value prints.
2 Q. Based on your personal experience what is the approximate
3 percentage of time you find prints of value on bullets?
4 A. I can say less than that.
5 Q. When you find no prints of value, does that mean no one's
6 ever touched the gun?
7 A. No prints of value that people handle the gun in a
8 different ways but they left, they don't leave enough
9 characteristic for identification to know who touched the gun.
10 MR. MARRAH: Thank you. Nothing further.
11 THE COURT: Cross?
12 CROSS-EXAMINATION
13 BY MS. BROWN:
14 Q. Good morning, Mr. Bekhit, is it?
15 A. Yes, ma'am.
16 Q. Mr. Apodaca's fingerprints were not on the gun, correct?
17 A. I don't know.
18 Q. Well, you just told us that you found no prints of value;
19 is that right?
20 A. Yes, ma'am.
21 Q. So that includes Mr. Apodaca's prints not being found by
22 you on the gun?
23 A. I couldn't find any of value prints on the gun.
24 Q. So that you did not identify a print and successfully
25 compare it to Mr. Apodaca; is that right?
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119

4AJAAAP02 Bekhit - Cross
1 A. I do not identify prints, ma'am.
2 Q. There were -- the bullet, you tested the bullets, right?
3 A. Yes, ma'am.
4 Q. No prints of value on the bullets?
5 A. Yes, ma'am.
6 Q. No prints that could later be tied to Mr. Apodaca; is that
7 correct?
8 A. Yes.
9 Q. You also tested the shell casings?
10 A. Yes.
11 Q. No prints of value on the shell casings?
12 A. Yes.
13 Q. And that includes no prints that could be tied to Mr.
14 Apodaca, right?
15 A. My job is to lift the prints only. If I get of val prints
16 I will photograph and to send it to another section to do the
17 identification. My job is to find a good print or of value
18 prints or no value prints or no prints at all. No, I don't